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Supreme Court, U.S.
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No. 99-1815

In The

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

KENTUCKY RIVER COMMUNITY CARE, INC., *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR RESPONDENT KENTUCKY RIVER COMMUNITY CARE, INC.

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board erroneously determined that Registered Nurses who exercise professional or technical judgment along with their own judgment in responsibly directing other employees in the interest of the employer are not "supervisors" under Section 2(11) of the National Labor Relations Act, 29 U.S.C. § 152(11).

2. Whether the Board should have the burden of proving that an individual is an "employee" rather than a "supervisor" under the NLRA and thus entitled to the rights and protections afforded by the Act.

3. Whether substantial evidence on the record as a whole warrants rejection of the Board's conclusion that the Employer's six RN Building Supervisors are employees rather than supervisors under the Act.

CORPORATE DISCLOSURE STATEMENT

Respondent Kentucky River Community Care, Inc. has no parent corporation and there is no publicly held company owning 10% or more of the corporation's stock.

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STATEMENT OF THE CASE

The Employer, Kentucky River Community Care, Inc. ("KRCC"), operates an eighty-bed residential treatment facility (Caney Creek) that provides care and psychiatric rehabilitation treatment to chronically mentally ill adults, with an emphasis on the development of independent living skills. J.A. 7. The facility operates twenty-four hours a day, seven days a week, and is divided into four units consisting of twenty residents per unit. J.A. 8, 16. Primary responsibility for the facility is vested in an administrator and an assistant administrator. J.A. 8. In addition, there are two unit coordinators, a nursing coordinator, a recreational counselor, a manager of housekeeping and maintenance, and a kitchen supervisor. J.A. 8; Pet. App. 45a.

There are approximately 110 professional and non-professional employees at Caney Creek, including six registered nurses ("RNs"), three licensed practical nurses ("LPNs"), 20 rehabilitation counselors, 40 rehabilitation assistants, three recreational assistants (for a total of 72 employees), and kitchen, dining room, housekeeping, and maintenance employees (an additional 38 employees). Employees are assigned to one of three shifts: first (7:00 a.m. to 3:30 p.m.); second (3:00 p.m. to 11:30 p.m.); or third (11:00 p.m. to 7:30 a.m.). J.A. 8, 16, 29, 35-36.

Caney Creek is required by contract with the State of Kentucky to have six RNs, and at least one RN is on each shift every day. J.A. 15-16. The 20 rehabilitation counselors, who have primary responsibility for developing treatment plans, generally work on the first shift. J.A. 11, 16. The 40 rehabilitation assistants, who function as direct

care staff and comprise the largest part of the manpower, are distributed over all three shifts. J.A. 12-13, 16. With the remaining employees also distributed over all three shifts, the first shift would include two RNs, one LPN, 20 rehabilitation counselors, approximately 13 rehabilitation assistants, one recreational assistant, and approximately 13 kitchen, dining room, housekeeping and maintenance employees, for a total of 48 to 50 employees. The second and third shifts would have a total of approximately 30 employees each, for a total of 110 employees.

The LPNs are supervised by and must comply with the directions of the RNs, particularly with respect to administering medication to residents and ensuring that proper documentation is done. J.A. 17-18, 29, 54. The RNs also direct the 40 rehabilitation assistants on how to deal with unusual situations that arise whenever a rehabilitation counselor is not present, *i.e.*, all times other than 7:00 a.m. to 3:30 p.m. Monday through Friday. J.A. 16. Also, whenever residents go on home visits or leave the building, the rehabilitation assistants must report their departure and return to the RN. J.A. 53; NLRB Transcript at 269-270. Whenever a resident starts acting up or appears out-of-sorts or feels ill, the rehabilitation assistant involved must report the situation directly to the RN on duty and follow the RN's instruction as to what action to take. J.A. 57, 58.

During the second and third shifts, throughout each weekend, on holidays, and in all emergencies, the RNs are designated Building Supervisors. This amounts to 75% of the total hours in a week. As Building Supervisors, the RNs are in charge of the entire facility and are the only persons on the premises charged with that

responsibility. J.A. 17, 29, 36. Additionally, whenever the administrator and treatment coordinators[1] are absent from the facility, the RNs assume the responsibility and authority of the Building Supervisor. J.A. 64. Through shift rotations, each RN serves as Building Supervisor at some point during the week. J.A. 16, 51. On some shifts there is only one RN Building Supervisor. J.A. 16.

The duties and responsibilities of the Building Supervisor have been set forth in three memoranda ("R/N-Building Supervisor Duties," "Procedure for Building Supervision," and a memorandum to all nurses dated August 23, 1996) which are kept in a Memoranda Notebook that every employee at the facility is required to read and initial indicating they indeed have read each of them. J.A. 48, 29, 62, 63, 64. These memoranda clearly communicate to all staff the fact that during the times when other Section 2(11) supervisors are not at the facility, the RN Building Supervisor has overall responsibility at the facility, and the staff are accountable and answerable to the Building Supervisor. J.A. 17, 27, 62. The Building Supervisor designation was created to centralize and coordinate building coverage, safety, and other activities. J.A. 17, 18. Building Supervisors are vested with the responsibility to oversee all coverage issues. J.A. 17.

Building Supervisors visit the units to check the coverage and, if necessary, determine in their judgment which employees to move from one unit to another. J.A. 18-19, 63; NLRB Transcript at 147. It is the Building

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[1] The terms "treatment coordinator" and "unit coordinator" are used interchangeably. J.A. 61; Pet. App. 45a.

Supervisor's responsibility to make the judgment about whether additional coverage is needed and then transfer or move people from one unit to another to ensure coverage. NLRB Transcript at 147, 155. As the facility Administrator explained, "[y]ou need someone that really has – is looking at all the resources within the building, to see what's needed." J.A. 17. "[Y]ou needed someone who had ultimate responsibility, to have the authority – to act." J.A. 27. He testified that the Building Supervisors' primary responsibility is that of senior medical staff in the building at all times. They also are responsible for any kind of medical services and for overviewing the coverage in regard to basic safety as well as special activities or needs in the building. J.A. 16-17.

If a problem arises with a resident, the Building Supervisor can increase the staffing level. J.A. 24. Employees called in or asked to stay late by an RN get overtime pay. NLRB Transcript at 206. One rehabilitation assistant testified that he has been called in or asked to stay over by the RN "a lot." NLRB Transcript at 206, 334. Building Supervisors handle staff shortages when they arise by arranging coverage from the preceding shift and/or by calling off-duty employees. J.A. 36, 64. The Building Supervisors have the express authority to write up an employee who does not comply with a decision to shift that employee between units. J.A. 63. They also have authority to send an employee home whenever that employee engages in misconduct. The Building Supervisor exercises her independent judgment to determine if such action is warranted. J.A. 20-21. This authority

extends over all staff, including nursing staff, rehabilitation staff, and maintenance staff, provided that the Building Supervisor subsequently informs the employee's immediate supervisor. J.A. 20, 26. "[W]hatever's necessary can be carried out" by the Building Supervisor. J.A. 28.

SUMMARY OF ARGUMENT

I. The Board erroneously determined that the six RNs at Caney Creek who exercise professional judgment along with their own judgment are not supervisors under the Act.

To be a "supervisor," an individual must have authority, in the interest of the employer, to do any *one* of twelve statutory functions, provided that the exercise of that authority is not of a merely routine or clerical nature but requires the use of independent judgment. 29 U.S.C. § 152(11). The Board argues the RNs at issue in this case are not statutory supervisors because they do not use independent judgment when they responsibly direct other employees. That conclusion was purportedly reached applying the Board's interpretation of the term "independent judgment," *i.e.*, that an employee's exercise of professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards does not constitute the exercise of "independent judgment."

The Board's interpretation is irrational and inconsistent with the NLRA. The rule the Board follows creates a false dichotomy between the exercise of professional judgment and independent judgment and is an attempt to

revive the patient care analysis rejected by the Court in *N.L.R.B. v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994).

The Board's interpretation also contravenes the Congressional purpose of including "responsibly to direct" in the definition of supervisor under the Act. In 1947, Congress amended the definition of "employee" in the NLRA to exclude "any individual employed as a supervisor," 29 U.S.C. § 152(3), and added a section defining the term "supervisor." *Id.* § 152(11). "Responsibly to direct" was added specifically to include as supervisors individuals who exercise professional judgment when directing other employees. 93 Cong. Rec. 4677-78 (1947); *Providence Hospital*, 320 NLRB 717, 727 (1996), enf'd, 121 F.3d 548 (CA9 1997).

The Board's interpretation also contravenes the Congressional purpose behind the supervisor exclusion. Congress excluded supervisors from the Act to restore the balance of power between employers and unions and to avoid conflicts of interest between management and rank-and-file employees. *N.L.R.B. v. Yeshiva University*, 444 U.S. 672, 682 (1980); *Florida Power & Light Co. v. International Brotherhood of Electrical Workers, Local 641*, 417 U.S. 790, 808-10 (1974).

The Board maintains that its interpretation properly accommodates the Act's coverage of professional employees, but in fact it will eliminate professionals as supervisors. *Schnurmacher Nursing Home v. N.L.R.B.*, 214 F.3d 260, 269 (CA2 2000). Individuals who exercise supervisory authority granted by the employer responsibly to

direct employees fail the Board's test simply because they possess a professional degree and utilize those skills.

Moreover, the Board is not entitled to deference in interpreting the term "independent judgment" because the Board has a history of inconsistent rulings in supervisor cases and has manipulated the statute to accomplish its biased policy objectives. *N.L.R.B. v. Attleboro Assoc., Ltd.*, 176 F.3d 154, 160-61 (CA3 1999); *Beverly Enterprises, Virginia, Inc. v. N.L.R.B.*, 165 F.3d 290, 295 (CA4 1999); *Mid-America Care Foundation*, 148 F.3d 638, 642 (CA6 1998); *Spentonbush/Red Star Co. v. N.L.R.B.*, 106 F.3d 484, 492 (CA2 1997).

II. Pursuant to the Administrative Procedure Act, the Board has the burden of proving every element of a claim that an employer violated the NLRA. 5 U.S.C. § 556(d); *Director, Office of Workers' Compensation Programs v. Maher Terminals, Inc.*, 512 U.S. 267, 279-81 (1994).

The Sixth Circuit below held that the Board was required to prove KRCC committed a Section 8(a)(5) violation when it refused to bargain with the Union. The Board should have the burden of proving that the unit represented by the Union is comprised solely of "employees." See 29 U.S.C. § 158(a)(5), (b)(3), (d). Putting the burden of proof on the Board in Section 8(a)(5) cases is consistent with the Board's burden of proving that an employer is liable for Section 8(a)(1) and 8(a)(3) unfair labor practices. Furthermore, the Board should have the burden of proof because it has failed to provide any meaningful guidance to employers.

III. The Board's conclusion that the six RNs at Caney Creek are not statutory supervisors is not supported by substantial evidence.

The Court of Appeals for the Sixth Circuit disagreed with the Board and found that the RNs are statutory supervisors and should have been excluded from the bargaining unit. Pet. App. 19a. The Sixth Circuit's decision should be affirmed because the substantial evidence on the record as a whole does not support the Board's conclusion.

There are numerous Board decisions in which the Board found comparable individuals to be supervisors under the Act. In this case, the Board improperly refused to credit probative evidence that RN Building Supervisors have authority responsibly to direct other employees and do so using independent judgment. If the RN Building Supervisors are not deemed supervisors, then the facility would be operating without *any* on-site or front-line supervision for 75% of the time the facility operates. Moreover, the workforce would be comprised of only 5% supervisors. Such results are both unreasonable and counter to the statute.

ARGUMENT

I. The Board's interpretation of "independent judgment" is irrational, arbitrary, and inconsistent with the Act.

Pursuant to the Administrative Procedure Act ("APA"), courts must set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A); *Allentown Mack Sales & Service, Inc. v. N.L.R.B.*, 522 U.S. 359,

377 (1998). Here the Board's interpretation of "independent judgment," as it relates to professionals who responsibly direct employees, is irrational, arbitrary, an abuse of discretion, and contrary to the text and purpose of the NLRA.

A. The Board's interpretation is a disguised attempt to revive the patient care analysis and creates a false dichotomy between professional judgment and independent judgment.

The Board attempts to revive the patient care analysis rejected by this Court in *N.L.R.B. v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994) (hereinafter referred to as *"HCR"*), and its interpretation creates a false dichotomy between professional judgment and independent judgment.

HCR involved the Board's interpretation of the phrase "in the interest of the employer" in Section 2(11) of the NLRA. The Board took the position that a nurse's supervisory activity is not exercised in the interest of the employer if it is incidental to the treatment of patients. *Id.* at 576. Rejecting that interpretation, the Court explained that the Board created a false dichotomy between patient care and the interest of the employer. *Id.* at 577-578. "That dichotomy makes no sense." *Id.* at 577.

In the health care context, nurses responsibly direct employees as to patient care; therefore, the distinction the Board makes between professional or technical judgment and independent judgment "is nothing more than an attempt to resurrect the Board's 'patient care' analysis." *N.L.R.B. v. Attleboro Assoc., Ltd.*, 176 F.3d 154, 168 (CA3 1999). Simply because the activity being supervised is

related to patient care cannot automatically mean the individual fails to qualify as a supervisor. *N.L.R.B. v. Beacon Light Christian*, 825 F.2d 1076, 1079 (CA6 1987).

The Board assumes irrationally and unreasonably that when a professional utilizes "professional or technical judgment" in the responsible direction of employees, that person is not using "independent judgment." The Board's interpretation improperly equates the exercise of professional judgment with the concept of "routine or clerical in nature." That interpretation is irrational and inconsistent with the Act. "[T]he use of independent judgment does not become 'merely routine' when exercised in the interest of patients." *Beverly California Corp. v. N.L.R.B.*, 970 F.2d 1548, 1553 (CA6 1992); *Integrated Health Serv. of Michigan v. N.L.R.B.*, 191 F.3d 703, 711-12 (CA6 1999) (finding that the Board relies on a false dichotomy "in contending that a nurse's supervisory acts are merely routine and do not involve independent judgment where the acts are informed by the nurse's training and experience as a nurse"). Such a false dichotomy between professional judgment when supervising patient care versus independent judgment when supervising in other ways makes no sense. "The essence of independent judgment is that the individual's actions are based on the thought processes of that individual, rather than on some outside force or person." *Nymed, Inc.*, 320 NLRB 806, 815 (1996) (Cohen dissenting).

The Board itself has recognized that such responsible direction *can* involve independent judgment:

> In a nursing home servicing elderly and sick patients whose critical needs may momentarily require variations in standard procedures, the nurse responsible for the supervision of other nurses or a shift or a section must obviously be prepared to exercise *her discretion* in utilizing her training and experience and assign and direct employees placed under her authority more than clerically or routinely.

Avon Convalescent Center, Inc., 200 NLRB 702, 706 (1972) (emphasis added), enf'd, 490 F.2d 1384 (CA6 1974), overruled by *Northcrest Nursing Home*, 313 NLRB 491 (1993). The Board's interpretation in the instant case is wrong. Instead, the focus should be on the discretion used by the RN in exercising overall authority and responsibility for other employees. "The supervisor exercises independent judgment with respect to the functions listed in Section 2(11), and he or she does so vis-a-vis employees. By contrast, the professional exercises discretion and judgment with respect to the task that he or she performs." *Providence Hospital*, 320 NLRB 717, 737 (1996) (Cohen dissenting), enf'd, 121 F.3d 548 (CA9 1997). Such discretion is the essence of independent judgment and describes precisely the authority possessed by the Caney Creek RNs.

By assuming that exercising professional judgment is *always* routine, the Board ignores the well-recognized principle that the analysis of whether an individual is a supervisor is fact-specific.[2] See *HCR*, 511 U.S. 571, 586

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[2] A determination of whether something is "routine" requires a case-by-case analysis to determine whether the individual who responsibly directs other employees is tightly constrained in his or her decision-making or exercises independent judgment. It should not matter if the source of that judgment is professional expertise. "If an individual's

(Ginsburg, J., dissenting) (emphasizing the Board's "case-by-case adjudication . . . to distinguish individuals exercising the level of control that truly places them in the ranks of management, from highly skilled employees, whether professional or technical, who perform, incidentally to their skilled work, a limited supervisory role"); *Integrated Health Serv. of Michigan v. N.L.R.B.*, 191 F.3d 703, 707 (CA6 1999) (explaining that "[t]he inquiry into supervisory status is 'fact-intensive' "); *N.L.R.B. v. Attleboro Assoc., Ltd.*, 176 F.3d at 163 ("Of course, resolution of the question whether a charge nurse exercises independent judgment is inherently factual in nature"); *Caremore, Inc. v. N.L.R.B.*, 129 F.3d 365, 370 (CA6 1997) (noting that the question of supervisory status under the Act predominantly involves a factually intense inquiry into the circumstances of each individual case).

At Caney Creek, "rarely anything . . . is routine, due to its environment, its employees, and the special needs of its residents." MOTLEY, GRANDMOTHERS AND TEAMSTERS: HOW THE NLRB'S NEW APPROACH TO THE SUPERVISORY STATUS OF CHARGE NURSES IGNORES THE REALITY OF THE NURSING HOME, 73 IND. L.J. 711, 739 (1998) (discussing nursing homes). A rehabilitation counselor testified at the Board hearing below that unexpected situations involving residents do occur. J.A. 57, 58. Problems with a resident may

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discretion with respect to assignment, discipline, or the other statutory factors is tightly constrained, then her authority is 'routine' and does not involve 'independent judgment.' " *Beverly Enterprises-Pennsylvania, Inc. v. N.L.R.B.*, 129 F.3d 1269, 1270 (CADC 1997).

require temporary increases in staff. J.A. 24. If a complication occurs during a resident's home visit, the Building Supervisor makes a judgment call about sending staff to assist. NLRB Transcript at 208. Unexpected situations can occur with employees as well. J.A. 20, 21. If, in the judgment of the RN Building Supervisor, an employee has engaged in misconduct and must be sent home, she will have to re-direct the staff to maintain adequate coverage. J.A. 20. These scenarios demonstrate that exercise of judgment by RN Building Supervisors is not of a routine or clerical nature and is typical of supervisors irrespective of their professional training. Accordingly, they exercise independent judgment and are statutory supervisors.

B. The Board's interpretation frustrates the legislative intent behind both the phrase "responsibly to direct" and the Act's exclusion of supervisors.

The Board takes the position that this case is limited solely to the interpretation of "independent judgment" and disavows any argument that the term "responsibly to direct" is implicated in the analysis. See Brief for the NLRB at 21-22 n.9. That term is at issue because the rule as articulated by the Board applies when professionals are exercising professional judgment "in directing less-skilled employees to deliver services."

In *HCR*, the Court rejected the Board's interpretation of "in the interest of the employer" because it rendered portions of the statutory definition in Section 2(11) meaningless, specifically, the phrase "responsibly to direct."

HCR, 511 U.S. at 578-79. The Court, in rejecting the Board's test, stated:

> Under the Board's test, however, a nurse who in the course of employment uses independent judgment to engage in responsible direction of other employees is not a supervisor. Only a nurse who in the course of employment uses independent judgment to engage in one of the activities related to another employee's *job status or pay* can qualify as a supervisor under the Board's test.

Id. at 579 (emphasis added). Such a result was unjustified. *Id.* Similarly, the Board's interpretation of "independent judgment" in the instant case suggests that only a nurse who performs, in the interest of the employer, functions other than responsibly directing employees, can qualify as a supervisor. This is contrary to the intent of the Act.

Analysis of the Act's legislative history demonstrates that inclusion of "responsibly to direct" in the definition of supervisor was intended to include as supervisors those individuals who exercise professional judgment when directing other employees. *Nymed, Inc.*, 320 NLRB 806, 815 (Cohen dissenting) (finding that Senator Flanders explicitly sought to include as supervisors those individuals who exercise "personal judgment based on personal experience, training, and ability").

Senator Flanders explained his reason for proposing "responsibly to direct" in the definition of "supervisor":

> As an employer for many years past, and until I resigned to enter this body, I can say that the definition of "supervisor" in this act seems to

> me to cover adequately everything except the basic act of supervising.
>
> * * *
>
> In fact, under some modern management methods, the supervisor might be deprived of authority for most of the functions enumerated and still have a large responsibility for the exercise of personal judgment based on personal experience, training, and ability. He is charged with the responsible direction of his department and the men under him. He determines under general orders what job shall be undertaken next and who shall do it. He gives the instructions for its proper performance. If needed, he gives training in the performance of unfamiliar tasks to the worker to whom they are assigned.
>
> Such men are above the grade of "straw bosses, lead men, set-up men, and other minor supervisory employees" as enumerated in the report. Their essential managerial duties are best defined by the words "direct responsibly," which I am suggesting.
>
> In a large measure, the success or failure of a manufacturing business depends on the judgment and initiative of these men.

93 Cong. Rec. 4677-78 (1947). This language was accepted by Senator Taft and added to the definition of "supervisor." *Id.* at 4678.

An interpretation that denies supervisory status to RNs who use personal judgment responsibly to direct employees under them contravenes the intent of the statute as explicitly articulated by Senator Flanders. The Board has acknowledged that the addition of responsibly

to direct "was designed to include those individuals who exercised the essence of supervision without having the authority to exercise any other statutory indicium." *Providence Hospital*, 320 NLRB 717, 727 (1996), enf'd, 121 F.3d 548 (CA9 1997). That clear purpose is frustrated by the Board's conclusion that using professional judgment to direct others never involves the exercise of independent judgment.

The Board's interpretation also undermines the importance of loyal supervisors, particularly in a health care setting where the well-being of residents is paramount. Among the purposes of the legislation that placed supervisors outside the coverage of the NLRA were the restoration of a reasonable balance of power between employers and unions and avoidance of the conflicts of interest that may arise if an individual directing the work of union members on the job is herself a union member. *Beverly California Corp. v. N.L.R.B.*, 970 F.2d 1548, 1556 (CA6 1992). The exclusion of supervisors from the Act addressed the concern that "an employer is entitled to the undivided loyalty of its representatives." *N.L.R.B. v. Yeshiva University*, 444 U.S. 672, 682 (1980); see also *Florida Power & Light Co. v. International Brotherhood of Elec. Workers, Local 641*, 417 U.S. 790, 806-07 (1974). There is no exception for supervisors in the health care field, and the idea of creating such an exception was rejected at the committee level. *Beverly California Corp.*, 970 F.2d at 1552, citing S.Rep. No. 93-766, 93rd Cong., 2d Sess. 6 (1974).

If the RN Building Supervisors are not found to be supervisors, disloyalty to management will jeopardize resident care. See *HCR*, 511 U.S. at 58-81 (rejecting the

Board's confidence that there is no danger of divided loyalty). The RN Building Supervisor, as the sole supervisor on site in the evenings, on the third shift, throughout the weekend, on all holidays, and in all emergencies, may be confronted with pressure from her union brothers and sisters.[3] Including RNs who are in charge of other employees in the same bargaining unit, especially ones who are in charge of an entire facility like the RNs at Caney Creek, significantly reduces the employer's ability to monitor interaction between employees and residents.

C. The Board's interpretation will eliminate professionals as supervisors.

As it did in *HCR*, the Board attempts to resolve a perceived tension between the Act's exclusion of supervisors and inclusion of professionals by distorting the statutory language. See *HCR*, 511 U.S. at 581. The Court can reconcile the distinction between professionals and supervisors without endorsing the Board's irrational and over-reaching interpretation.

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[3] For example, if union members engaged in a slow-down of work, the supervisory nurse would likely be required to report the slow-down, which could result in discipline. If the supervisory nurse were a fellow union member, she may feel pressure not to report the action. MOTLEY, GRANDMOTHERS AND TEAMSTERS: HOW THE NLRB'S NEW APPROACH TO THE SUPERVISORY STATUS OF CHARGE NURSES IGNORES THE REALITY OF THE NURSING HOME, 73 IND. L.J. 711, 736-37 (1998). Another example is the possibility of favoritism and pressure that could be exercised by a union-member supervisor in giving extra duties to a nonunion member. *Id.* at 741.

The NLRB's interpretation will virtually eliminate professionals as supervisors. See *Schnurmacher Nursing Home v. N.L.R.B.*, 214 F.3d 260, 269 (CA2 2000) (expressing concern that "many quintessentially supervisory employees will in the Board's view always be exercising authority that does not constitute responsible direction or the exercise of independent judgment because it is either 'routine' or 'based on superior training and skills' "); *Providence Alaska Medical Center v. N.L.R.B.*, 121 F.3d 548, 556 (CA9 1997) (Noonan, C.J., dissenting) (concluding that the Board's strained interpretation "in effect declares that a professional who is supervising other professionals[4] cannot be a supervisor"). In every case involving professionals who perform only the "responsibly to direct" component of Section 2(11), the Board will find that the individual's judgment "simply flowed from the nurses' professional knowledge and training." *Integrated Health Services of Michigan*, 191 F.3d at 711. The Board's explanation of its position in *Providence Hospital*, 320 NLRB 717 (1996), enf'd, 121 F.3d 548 (CA9 1997), reflects the improper result its interpretation will have:

> [T]he essence of professionalism requires the exercise of expert judgment and the essence of supervision requires the exercise of independent judgment. . . . [T]he alleged supervisory independent judgment of charge nurses when examined in detail becomes indistinguishable from the professional judgment exercised by all RNs.

Id. at 730. Accordingly, once the Board decides the RN is using her professional expertise in assigning and directing employees, it will conclude that she is not exercising independent judgment and is not a supervisor. This is an irrational conclusion.

Such an over-reaching result is endorsed by the American Nurses Association in its Amicus Brief. See Brief *Amicus Curiae* of American Nurses Association at 13 ("[T]he scope of any 'independent judgment' exercised by one member of the nursing staff in directing the work of another is so sharply constrained by these hospital-generated guidelines, that it is 'routine' within the meaning of § 2(11).") This result is irrational and inconsistent with the Act because it precludes nurses who responsibly direct other nurses from *ever* being supervisors.[5]

The dissent in *HCR* discussed the distinction between professionals who qualify as statutory supervisors and those who do not. Where professionals' "decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned," they are not supervisors. See *HCR*, 511 U.S. at 592 (Ginsburg, J.,

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[4] It should be noted that the RN Building Supervisors at Caney Creek are supervising LPNs, rehabilitation assistants, and recreational assistants, all of whom are non-professionals. Pet. App. 55a (describing voting groups). The dynamic between professionals and non-professionals more strongly suggests a supervisor-employee relationship.

[5] At Caney Creek, the RN Building Supervisors are supervising rehabilitation and recreational staff in addition to nursing staff (LPNs). The professional training and expertise possessed by RNs is likely quite different from that of non-professional rehabilitation assistants and recreational assistants. Accordingly, the ANA's argument about nurses supervising nurses does not apply in this case.

dissenting). Likewise, where professionals do not possess "authority encompassing front-line management prerogatives," they are not supervisors. *Id.* at 590-91. On the other hand, if a professional's authority "flows from management and tends to identify or associate a worker with management," that worker is a supervisor. *Id.* at 592.

The RN Building Supervisors at Caney Creek have authority encompassing front-line management prerogatives. Management issued three Memoranda, which all employees were required to read and sign, making it clear the RNs were Building Supervisors. The authority possessed by the RNs flowed from management and identified them as part of management. They use personal judgment and discretion to carry out management directives related to personnel issues such as staffing, assigning, disciplining, and monitoring.[6] Being in charge of and accountable for the performance of employees is the type of management authority that historically has been determined to support supervisory status, even if exercising that authority involves some reliance on professional experience. For example, if an RN knows, based on professional training and experience, which employee

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[6] In discussing the distinction between exercising expert judgment versus independent discretion, one commentator offered this example: "An example of such a distinction would be the 'professional' nurse who uses his or her discretion to complete the task of devising a patient-treatment plan, and the 'supervisory' nurse who administers the plan through the responsible direction and assignment of other employees." Motley, Grandmothers and Teamsters: How the NLRB's New Approach to the Supervisory Status of Charge Nurses Ignores the Reality of the Nursing Home, 73 Ind. L.J. 711, 730 (1998).

is best suited to assist when a safety concern arises and makes an assignment, she functions as a statutory supervisor when she acts on that knowledge.

By performing the appropriate case-by-case analysis, the courts and the Board can strike the appropriate balance between those professionals who are statutory supervisors and those who are not.

D. Deference to the Board is not required because the Board has engaged in blatant manipulation of the statute to further policy rather than following the text and intent of the statute.

The Union argues that deference to the Board's construction of the term "independent judgment" is mandated by *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Brief for the Union at 16.[7] *Chevron* deference is inappropriate because the NLRB has used arbitrary and manipulative means to achieve policy-directed results. See *N.L.R.B. v. Attleboro Assoc., Ltd.*, 176 F.3d 154, 160-61 (CA3 1999) (agreeing that a more probing review and less deference is warranted in Section 2(11) cases because the Board has mishandled the issue and manipulated the definition); *Beverly Enterprises, Virginia,*

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[7] Interestingly, the Board does not rely upon *Chevron* in its Brief. Instead, the Board relies on two cases from the 1960s in which the Court simply recognized the Board's expertise in this area. Brief for the NLRB at 34. Neither the majority nor the dissenting Justices in *HCR*, 511 U.S. 571 (1994), raised the *Chevron* standard. See *Mid-America Care Foundation v. N.L.R.B.*, 148 F.3d 638, 643 n.4 (CA6 1998).

Inc. v. N.L.R.B., 165 F.3d 290, 295 (CA4 1999) ("In applying the definition of supervisor in 29 U.S.C. § 152(11), the Board has, we believe, manifested an irrational inconsistency."); *Mid-America Care Foundation v. N.L.R.B.*, 148 F.3d 638, 642 (CA6 1998) (concluding that *Chevron* deference is inappropriate when an agency's application of a statutory interpretation frustrates judicial review); *Spentonbush/Red Star Co. v. N.L.R.B.*, 106 F.3d 484, 492 (CA2 1997) ("the Board's biased mishandling of cases involving supervisors increasingly has called into question our obeisance to the Board's decisions in this area").

Even the Seventh and Eighth Circuit Courts of Appeals, which approve of the Board's interpretation of "independent judgment," agree that the Board is not entitled to the usual deference in supervisor cases. See *N.L.R.B. v. Winnebago Television Corp.*, 75 F.3d 1208, 1214 (CA7 1996) ("the NLRB's manipulation of the definition provided in [section 2(11)] has earned it little deference"); *Schnuck Markets, Inc. v. N.L.R.B.*, 961 F.2d 700, 704 (CA8 1992) (explaining that review of Board decisions "necessarily becomes more probing when the Board has exhibited a pattern of applying the statute inconsistently"); *Children's Habilitation Center, Inc. v. N.L.R.B.*, 887 F.2d 130, 132 (CA7 1989) (stating that "an administrative agency, like any other first-line tribunal, earns – or forfeits – deferential judicial review by its performance").

The Board's slant towards policy-driven outcomes is evident upon comparing the instant case to cases in which the Board seeks to establish employer liability through supervisors. In cases involving alleged unlawful threats, intimidation, or discrimination (Section 8(a)(1) and 8(a)(3) cases), the Board is more likely to conclude

based on facts similar to the instant case that an individual is a supervisor, because a finding of supervisory status renders the employer liable for an unfair labor practice. See *Great American Products*, 312 NLRB 962, 962 (1993) (finding employer liable for comments by a lead man because "he was held out by management as a supervisor and the employees working under his direction so viewed him"); *Avon Convalescent Center, Inc.*, 200 NLRB 702, 706 (1972) (concluding that employer was liable for conduct and statement of five nurses because those nurses were supervisors), enf'd, 490 F.2d 1384 (CA6 1974), overruled by *Northcrest Nursing Home*, 313 NLRB 491 (1993); *Rockville Nursing Center*, 193 NLRB 959, 962 (1971) (concluding that employer was responsible for acts and conduct of eight RNs who served as "house supervisors" because the RNs were statutory supervisors by virtue of fact they "responsibly directed the work of the employees involved"), overruled by *Northcrest Nursing Home*, 313 NLRB 491 (1993); *National Living Centers, Inc.*, 193 NLRB 638, 638-39, 641 (1971) (concluding that employer had knowledge of employee's union activity through nurse who was the night supervisor).

In *Clark & Wilkins Industries, Inc.*, 290 NLRB 106 (1988), aff'd, 887 F.2d 308 (CADC 1989), cert. denied, 495 U.S. 934 (1990), the Board concluded that a lead man was a supervisor by virtue of working with other employees, deciding when other employees worked on site and the work they performed, and authorizing changes in the work they are doing. Consequently, the lead man's knowledge of union activity was imputed to the employer. *Id.* at 109-10. Interestingly, the Board reached

that conclusion even though the parties stipulated to the lead man's eligibility to vote in the election. *Id.* at 107 n.2.

Despite the Board's acknowledgment that it "should use the same standard in unfair labor practice cases as in representation cases," *Providence Hospital*, 320 NLRB 717, 736 n.31 (1996), enf'd, 121 F.3d 548 (CA9 1997), the cases above and the instant case reveal its repeated failure to do so. Where the Board has displayed inconsistency and manipulation of the statute, "a close and thorough examination of the record is called for to ensure that the Board's findings are supported by substantial evidence and that its decision is not arbitrary and capricious." *Beverly Enterprises v. N.L.R.B.*, 148 F.3d 1042, 1046 (CA8 1998).

For these reasons, the Court should not defer to the Board's interpretation of the statute (as discussed above) or its factual determinations (as discussed in Part III).

II. The Board should have the burden of proving an individual is not a supervisor because the Board is the party alleging that an individual is an "employee" under the Act and entitled to protection of the Act.

Pursuant to the APA, the burden is on the Board to prove all the elements of a Section 8 claim, *i.e.*, that the employer interfered with, restrained, or coerced "employees" in the exercise of their rights, encouraged or discouraged membership in a labor organization by discriminating, or refused to bargain collectively with the employees' representative. 5 U.S.C. § 556(d); 29 U.S.C.

§ 158(a)(1), (3), (5); *Director, Office of Workers' Compensation Programs v. Maher Terminals, Inc.*, 512 U.S. 267, 279-81 (1994).[8] On the other hand, employers have the right to discharge "supervisors" because of their involvement in union activities or union membership. *Florida Power & Light Co. v. International Brotherhood of Electric Workers, Local 641*, 417 U.S. 790, 808 (1974). They also have the right to refuse to engage in collective bargaining with "supervisors." *Id.* Consequently, proving that a particular individual is an "employee" is an element of the claim against the employer. Because the term "employee" is defined by the Act to exclude supervisors, see 29 U.S.C. § 152(3), the distinction between "employees" and "supervisors" is an element of the Board's case.

For example, where the Board alleges that an employer violated Section 8(a)(3) by discriminating against an individual because of his/her union activities, the Board should have the burden of proving that the individual is entitled to protection under the Act. Cf. *Westwood Health Care Center*, 330 NLRB No. 141, 2000 WL 309119, *1 (Mar. 20, 2000) (finding that discharges of two individuals were not unlawful because the individuals were statutory supervisors). To be protected, the individual must be an employee and not a supervisor.

Similarly, in a Section 8(a)(5) case, the Board should have the burden of proving that the employer failed to bargain with an appropriate unit. To be appropriate, a bargaining unit must be made up of "employees" and no

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[8] The instant case involves an allegation that KRCC violated Section 8(a)(5) by refusing to bargain with the Union.

"supervisors." This, therefore, is an element of the Board's case, and the Board should have the burden of proving it.

In addition, placing the burden of proof on the employer is inequitable because the Board has failed to provide sufficient guidance as to how the employer could meet its burden of proving supervisor status. The Board reaches inconsistent results and more often explains what a supervisor is *not* rather than what a supervisor *is*. See, e.g., *Providence Hospital*, 320 NLRB 717, 727, 729 (1996) (refusing to explain when "assignment" is made with independent judgment, and refusing to undertake an analysis of the meaning of "responsibly to direct"), enf'd, 121 F.3d 548 (CA9 1997).

Based on the above, the burden of proving supervisory status should be on the Board.

III. The evidence in the record as a whole demonstrates that the six RNs at Caney Creek are supervisors under the Act.

Whether or not the Court adopts the Board's interpretation of "independent judgment" and its allocation of the burden of proof, the Sixth Circuit's decision should be affirmed because substantial evidence proves that the six RN Building Supervisors are "supervisors" under the Act. The Board's erroneous conclusion is unsupported by substantial evidence on the record as a whole. *Allentown Mack Sales & Service, Inc. v. N.L.R.B.*, 522 U.S. 359, 366 (1998); *Caremore, Inc. v. N.L.R.B.*, 129 F.3d 365, 369 (CA6 1997).

Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 477 (1951), citing *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938).

In *Universal Camera Corp.*, this Court made it clear that, pursuant to both the APA and the NLRA, reviewing courts are entitled, in fact required, to scrutinize decisions of the Board. 340 U.S. at 487, 489; 5 U.S.C. § 706(2)(E); 29 U.S.C. § 160(e). Congress has made it clear that "a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." *Universal Camera Corp.*, 340 U.S. at 488. "Congress has imposed on [reviewing courts] responsibility for assuring that the Board keeps within reasonable grounds." *Id.* at 490.

The Sixth Circuit below properly reviewed the record as a whole and concluded that the Board's decision was not supportable and not based on reasonable grounds. The court concluded that RN Building Supervisors exercise duties that are supervisory in nature:

> [they] direct the LPNs in the proper dispensing of medication, regularly serve as the highest ranking employees in the building, seek additional employees in the event of a staffing shortage, move employees between units as needed, and have the authority to write up employees who do not cooperate with staffing assignments.

> These duties involve independent judgment which is not limited to, or inherent in, the professional training of nurses.

Pet. App. 18a-19a, reported at 193 F.3d 444, 454 (CA6 1999). Accordingly, the RNs are statutory supervisors and should not have been included in the bargaining unit. Pet. App. 19a.

A. The RN Building Supervisors exercise independent judgment beyond, as the Board terms it, "ordinary professional or technical judgment."

Even if the Board's interpretation is applied, substantial evidence does not support the conclusion that these RNs were simply exercising "ordinary professional or technical judgment." This Court has explained that "[o]nly if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management." *N.L.R.B. v. Yeshiva University*, 444 U.S. 672, 690 (1980). The substantial evidence on the record meets that requirement because other employees do not perform the activities of the RN Building Supervisor.

RNs at Caney Creek are the senior medical staff in the facility, have the responsibility to oversee all staff coverage issues, have authority to direct all staff throughout the facility when and where to work, can transfer employees and assign overtime, have ultimate responsibility for resident safety, must be informed whenever a resident leaves the facility, and make judgments about employee violations of personnel policies. They are not merely exercising professional judgment when they make

decisions on their own in these non-treatment areas.[9] "[W]hen an employer grants to an employee the authority to use judgment in the management or evaluation of other employees, that judgment is independent judgment under the NLRA, not the exercise of professional expertise." *Beverly Enterprises, Virginia, Inc. v. N.L.R.B.*, 165 F.3d 290, 295 (CA4 1999). "[T]he assignment of work, direction of nursing assistants, discipline of nursing assistants, and similar duties are not simply professional medical functions. Rather, such decisions are part and parcel of what it means to be a manager and a supervisor." *Id.* at 298.

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[9] An important distinction between the instant case and cases rejecting nurses as statutory supervisors is that here we are not dealing with a fleet of nurses who simply treat patients. Cf. *Providence Alaska Medical Center v. N.L.R.B.*, 121 F.3d 548, 550-551, 554 (CA9 1997) (addressing supervisory status of 175 RNs serving as charge nurses and finding that they are "one of the gang with the RNs on their shift"). The Board must not be permitted to mischaracterize this case as a hospital case involving a large nursing staff. One commentator compared hospital settings to nursing home settings and concluded that the Board's approach ignores many of the differences between contested nurses in acute-need hospitals as opposed to contested nurses in long-term health facilities. He noted that the RN is usually the most disputed member of the proposed bargaining unit in the hospital setting, whereas the LPN is the most disputed member in the nursing-home setting. In nursing homes, the few RNs fill administrative and management roles. MOTLEY, NOTE, GRANDMOTHERS AND TEAMSTERS: HOW THE NLRB'S NEW APPROACH TO THE SUPERVISORY STATUS OF CHARGE NURSES IGNORES THE REALITY OF THE NURSING HOME, 73 IND. L.J. 711, 717-718 (1998). The author's analysis focused on LPNs serving as charge nurses, basically assuming that RNs in nursing homes are supervisors.

The authority and responsibilities granted to the RN Building Supervisors are part and parcel of what it means to be a manager or supervisor, and no other employee is given similar authority or responsibility. All staff at Caney Creek are informed that they are responsible and accountable to the RN Building Supervisor. J.A. 17, 62. This impresses upon employees that RNs are management's representatives with the authority "responsibly to direct" them. See *Schnurmacher Nursing Home. v. N.L.R.B.*, 214 F.3d 260, 269 (CA2 2000) (stating that "where one must both determine a treatment and ensure that others administer the treatment, it can hardly be said that supervisory authority is not being exercised").

In cases involving management structures identical to the one at Caney Creek, the parties stipulated that RNs filling similar roles to the RNs in this case were statutory supervisors. See, e.g., *Schnurmacher Nursing Home v. N.L.R.B.*, 214 F.3d 260, 263 (CA2 2000) (parties agreed that seven "nurse managers" were statutory supervisors); *N.L.R.B. v. Grancare, Inc.*, 170 F.3d 662, 664 (CA7 1999) (parties agreed that 19 RNs were supervisors under the Act but disagreed as to LPNs "who lie betwixt and between lowly CNAs and lofty RNs"); *Westwood Health Care Center*, 330 NLRB No. 141, 2000 WL 309119, *15 n.4 (Mar. 20, 2000) (noting that "the Regional Director for Region 18 clarified the unit at the Bryn Mawr facility . . . to exclude from the bargaining unit the p.m., night, and weekend building supervisors on the ground that they were statutory supervisors"); *North Dade Hospital, Inc.*, 210 NLRB 588, 592 (1974) (noting that the parties stipulated that the nursing supervisors on each shift were statutory supervisors, and that the second and third shift

nurses were in charge of the entire hospital operation due to the absence of administrative personnel); *Sherewood Enterprises*, 175 NLRB 354, 354 n.2 (1969) (noting that parties had not sought review of Regional Director's decision that five registered nurses – the director of nursing, the day shift supervisor, the P.M. shift supervisor, the night shift supervisor, and the central supply supervisor – were statutory supervisors).

Similarly, in the *Nymed* case, where the Board first articulated its post-*HCR* interpretation of "independent judgment," individuals comparable to the RNs in this case were deemed supervisors. In *Nymed, Inc.*, 320 NLRB 806 (1996), the Board stated at the outset that there were two RN nursing supervisors on the day shift *in addition to* the director of nursing, assistant director of nursing, and unit managers. On the evening and night shifts, no unit manager was on duty but there were two RN nursing supervisors on each shift. *Id.* at 807. The Board made the following factual findings as to these RN supervisors:

> [T]hese RNs make clinical rounds of the patients, check on those patients who are ill, and consult LPNs as to the condition of patients on their units. They also give medical advice to LPNs when needed and deal with medical emergencies . . . In addition, their duties include checking to be sure there is adequate staff present, and if not, calling personnel assigned to the next shift to see if they can come in early.

Id.

In *Newton-Wellesley Hospital*, 219 NLRB 699 (1975), the Board concluded that 11 nurse leaders were statutory

supervisors.[10] Nine of the 11 were employed on the day shift and served as head of one of the various patient care units the hospital maintained. *Id.* at 700. The remaining two functioned as evening shift supervisor and night shift supervisor respectively, and the Board noted that they "are frequently the only individuals appearing to possess any supervisory attributes in the nursing services division who are *physically present*, as a matter, during their respective shifts." *Id.* (emphasis added). Based on those facts, the Board concluded that those 11 nurse leaders were statutory supervisors:

> Supervisors or nurse leaders on the day shift are directly responsible for the direction of the work activities of the employees assigned to the respective unit which each heads. In performing these responsibilities, they make the kind of decisions reflecting the "exercise of professional judgment" not only affecting the care of patients but also affecting the employment conditions of the employees involved and which are therefore of a type properly to be described as reflecting the exercise of supervisory authority within the meaning of the Act.

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[10] The Board also concluded that nine assistant supervisors "who are employed on the night shift and evening shifts have responsibilities comparable to those of the supervisors on the day shift. As noted, there is only one supervisor on each of these shifts. . . . Accordingly, each such supervisor relies heavily on assistant supervisors." *Newton-Wellesley Hospital*, 219 NLRB at 700. The Board recognized two levels of statutory supervisors on the night and evening shifts. In the instant case, the Board refused to recognize even one level of supervisors.

Id. at 700. Even though "professional judgment" was used, it was used to manage employees, and they were found to be statutory supervisors.

In *Wing Memorial Hospital Ass'n*, 217 NLRB 1015 (1975), the employer contended that shift supervisors should be excluded from the bargaining unit as "supervisors," and the Board agreed. Six RNs served as shift supervisors at least two days per week. As shift supervisors, they were "in complete charge of all nursing personnel working on a particular shift" in a particular section of the hospital. *Id.* at 1015. They "must make daily adjustments in scheduling. They also authorize overtime, call in nurses who are off duty, and make transfers from one section to another." *Id.* Acknowledging that the use of professional judgment is not always the same as supervisory authority,[11] the Board nevertheless held that, "[a]lthough the shift supervisors herein may give some direction to other nursing personnel 'in the exercise of professional judgment,' the traditional standards for determining supervisory status remain applicable to the RNs." *Id.* at 1015-16; see also *Sherewood Enterprises*, 175 NLRB 354, 354 (1969) (holding that "floor head nurses" were statutory supervisors where, "[o]n duty in each

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[11] Before addressing the supervisory status of the RN shift supervisors, the Board specifically referred to the Senate Committee report relied on by the Union in its Brief. *Wing Memorial Hospital Ass'n*, 217 NLRB at 1015-16 & n.10, citing S.Rep. No. 93-766, 93rd Cong., 2d Sess. 6 (1974); see also Brief for the Union at 35. This Court explicitly rejected the Board's reliance on that Committee Report in *HCR*, 511 U.S. at 582, which may explain why the Board does not rely upon it in this case.

wing on each shift is a registered nurse who has the title 'floor head nurse' and, under her, as many as eight licensed vocational nurses and nurses' aides"); *University Nursing Home, Inc.*, 168 NLRB 263, 265 (1967) (excluding one LPN from the unit because she supervised the work of three nurses' aides and one orderly).

In *National Living Centers, Inc.*, 193 NLRB 638 (1971), the Board held that an LVN was a statutory supervisor because she served as the night shift supervisor. In that role, she was in charge of the entire building, she distributed work to nurses' aides, and employees had to see her to clear leaving early and arriving late. *Id.* at 638-39. The Board particularly noted that the "circumstances are clearly calculated and designed to impress employees with the fact that [the LVN] is their boss." *Id.* at 639.

Similarly, in *Rockville Nursing Center*, 193 NLRB 959 (1971), overruled by *Northcrest Nursing Home*, 313 NLRB 491 (1993), the Board concluded that eight RNs were supervisors under the Act because they all functioned at times as the "house supervisor" or "building supervisor."

> The facts as a whole reveal that thereafter the lone registered nurse on each shift was a "house supervisor." The "house supervisor" was in charge (during the shift to which he or she was assigned) of all nursing stations in operation. The responsibility of the "house supervisor" was to supervise the nursing area given the patients by the staff during the "house supervisor's" tour of duty. The "house supervisor's" responsibility included seeing that employees assigned to the shift were present, and if such personnel were not present, to call in other personnel. . . . The facts are clear that licensed practical nurses and some other employees reported to the house supervisors for instructions, and received instructions from such supervisors.

Id. at 962.

Like the RNs in *Nymed*, the nurse leaders in *Newton-Wellesley Hospital*, the shift supervisors in *Wing Memorial Hospital*, the LVN in *National Living Centers*, and the RNs in *Rockville Nursing Center*, the RN Building Supervisors at Caney Creek qualify as statutory supervisors. RNs are the senior medical staff in the building at all times and are responsible for quality resident care. J.A. 16-17, 62. As Building Supervisors, RNs supervise the second and third shifts on Monday through Friday and every shift on the weekends, on all holidays, and in all emergencies. J.A. 17, 29, 36. This constitutes 75% of the time the facility operates. At those times, no other supervisor is on site, and the RN Building Supervisors are in charge of the entire facility. J.A. 29, 36.

RN Building Supervisors visit the units to check the coverage and, if necessary, determine in their judgment which employees to move from one unit to another. J.A. 18-19, 63; NLRB Transcript at 147, 155. They are responsible for overseeing all safety and resident issues that occur. J.A. 17. If a problem arises with a resident or in the case of weather emergencies, the Building Supervisors can increase the staffing level by arranging coverage from the preceding shift and/or by calling off-duty employees. J.A. 24, 36, 64. The Building Supervisors have authority to write up employees who do not comply with a decision to shift that employee between units. J.A. 63. They also have authority to send an employee home whenever that

employee engages in misconduct. J.A. 20-21. They supervise LPNs regarding resident medication, and they consult with rehabilitation assistants concerning resident care and absence from the building. J.A. 16, 17-18, 53, 54, 57, 58. Employees are instructed to and do seek out the RNs for assistance with residents. J.A. 57, 58.

Based on comparable factual scenarios and the substantial evidence on the record as a whole, the Court should affirm the Sixth Circuit's conclusion that the RNs at Caney Creek are statutory supervisors and excluded from the bargaining unit.

B. If the RNs are not supervisors, then an entire staff and all its patients have no on-site supervision, and the ratio of supervisors to employees is unreasonable.

In addition to the specific authority and responsibilities vested in the RN Building Supervisors, the absence of any *other* on-site supervisors should be a significant factor in the analysis of their status as a supervisor. A psychiatric rehabilitation program, like a nursing home, cannot be well-run if there is no on-site supervision. *N.L.R.B. v. Beacon Light Christian*, 825 F.2d 1076, 1080 (CA6 1987); see also *Pine Manor Nursing Center*, 270 NLRB 1008, 1009 (1984) (concluding that 20 charge nurses are statutory supervisors in part because "if we were to find that the charge nurses are not supervisors, employees at the Employer's facility would be without on-site supervision during nights and weekends"); *National Living Centers, Inc.*, 193 NLRB 638, 639 (1971) (emphasizing that if LVN working night shift is not a supervisor, "then one

must conclude that the entire nursing home and its many patients are left without any direct supervision during the night hours, and this is not the case"); *Beverly Enterprises, Virginia, Inc. v. N.L.R.B.*, 165 F.3d 290, 298 (CA4 1999) (rejecting Board's conclusion because "[i]t strains credulity to imagine that for two-thirds of the operating time of the nursing home, no judgments other than routine and clerical judgments are made to keep the home operating"). Agreeing with the Board in the instant case would mean concluding that no judgments other than routine and clerical judgments are made for three-fourths of the time at the Caney Creek facility, an even more incredulous conclusion.

In *Providence Hospital*, 320 NLRB 717 (1996), enf'd, 121 F.3d 548 (CA9 1997) the presence of stipulated RN statutory supervisors was an important factor in the Board's conclusion that charge nurses were *not* statutory supervisors. *Id.* at 717.

> The centers that employ the disputed charge nurses . . . uniformly also employ supervisory RNs. The supervisory RNs, with the exception of the emergency services center, serve as charge nurses when they are present and actively involved in patient care. The presence of supervisory RNs limits the times when RN charge nurses are "in charge."

Id. at 730.

There are approximately 110 employees at Caney Creek, including six RNs (at issue here), three LPNs, 20 rehabilitation counselors, 40 rehabilitation assistants, three recreational assistants, and kitchen, dining room, housekeeping, and maintenance employees. J.A. 8, 29.

The Sixth Circuit and the Board agreed that the 20 rehabilitation counselors are not supervisors. Pet. App. 19a. The only individuals recognized by the Board as statutory supervisors are two administrators, two department managers, the nursing coordinator, a recreational counselor, and two unit coordinators. Pet. App. 45a. These eight "senior staff" members work only 7:30 a.m. to 5:00 or 6:00 p.m. J.A. 29, 36. Consequently, for most of the second shift, all of the third shift, throughout the weekend, and all holidays there would be no supervisor on duty if the RNs are not supervisors. A conclusion that there is no on-site supervision for approximately 70% of the time the facility operates is unreasonable.

Similar to the need for on-site supervision, the overall ratio of supervisors to non-supervisory employees must be rational and consistent with appropriate business standards. See *Beverly California Corp. v. N.L.R.B.*, 970 F.2d 1548, 1555 (CA6 1992) (finding that a ratio of one supervisor to 27 employees raises a warning flag); *N.L.R.B. v. Grancare, Inc.*, 170 F.3d 662, 666 (CA7 1999) (reiterating that its first "guiding light" in analyzing Board's determination of supervisor status "is the ratio of supervisor to nonsupervisory employees under the competing positions of the parties," and accepting a workforce with 14% supervisors); *Beverly Enterprises v. N.L.R.B.*, 148 F.3d 1042, 1047 (CA8 1998) ("The ratio of supervisors to non-supervisory employees is often significant in determining whether an employee has supervisory status.").

The Board concluded that rehabilitation counselors were not supervisors in part because a ratio of 20 supervisors for 40 employees "is totally unrealistic and militates against finding the rehabilitation counselors to be supervisors." Pet. App. 49a.

Finding that the RNs are not supervisors renders a totally unrealistic result in the opposite direction. The first shift is comprised of two RNs, one LPN, 20 rehabilitation counselors, approximately 13 rehabilitation assistants, one recreational assistant, and approximately 13 kitchen, dining room, housekeeping and maintenance employees, for a total of 48 employees. That leaves about 30 employees on each of the second and third shifts. Under the Board's analysis, for 110 total employees, there would be only six supervisors (two unit coordinators, a nursing coordinator, a recreational counselor, a manager of housekeeping and maintenance, and a kitchen supervisor). This results in 5% supervisors, all of whom work only on the day shift. Adding six RNs, as KRCC proposes, results in 12 supervisors for 104 employees, or 12% supervisors. Twelve percent is a much more reasonable result.

Focusing on the second and third shifts further demonstrates that RNs are statutory supervisors. There are approximately 30 employees on the second and third shifts, respectively. If the RNs are statutory supervisors, there would be at most two on-site supervisors for 28 employees, or 7%. Even if the one "on-call" supervisor is added, there would be three supervisors for 28 employees, or 11%.

The Board disregarded the absence of on-site supervision and the supervisor-to-employee ratios, thereby ignoring key substantial evidence opposed to its conclusion. Upon consideration of that evidence, the Court should find that the RNs are supervisors.

C. The Board improperly refused to recognize the authority granted to the RNs by management.

The Board's finding that the Caney Creek RNs are not statutory supervisors when they serve as Building Supervisors "rests on a refusal to credit probative evidence." *Allentown Mack Sales & Service, Inc.*, 522 U.S. at 268. Specifically, the Board improperly disregarded the authority bestowed upon Building Supervisors in the three Memoranda. Pet. App. 51a. Job descriptions and similar documents are persuasive evidence of supervisory authority. See MOTLEY, supra, at 720-21. It is the existence of authority that counts under the statute, and not the frequency of its exercise. *Beverly California Corp. v. N.L.R.B.*, 970 F.2d 1548, 1550 n.3 (CA6 1992), citing *N.L.R.B. v. Medina County Publications, Inc.*, 735 F.2d 199, 201 (CA6 1984); see also *Westwood Health Care Center*, 330 NLRB No. 141, 2000 WL 309119, *5 (March 20, 2000) (noting that the administrative law judge found that "it is the possession of supervisory power rather than its exercise that determines supervisory status"); *Pine Manor Nursing Center*, 270 NLRB 1008, 1009 (1984) (explaining that its conclusion that charge nurses are supervisors "is buttressed by the fact that charge nurses' written job description encompasses daily supervision of aides and orderlies"); *Avon Convalescent Center, Inc.*, 200 NLRB 702, 706 (1972) (explaining that "[a]ny question of the power

of [the five nurses] responsibly to direct other employees and to assign them – substantively, and not routinely – is convincingly answered by the Respondent's Policies, Rules and Regulations for Non-Professional Personnel"), enf'd, 490 F.2d 1384 (CA6 1974), overruled by *Northcrest Nursing Home*, 313 NLRB 491 (1993).

There is no logical reason to disregard the three Memoranda describing RN Building Supervisors' authority and responsibilities, because employers have a disincentive to grant supervisory authority to an individual if the individual cannot actually exercise that authority. For example, in the context of unfair labor practice cases, employers are liable for unlawful statements and conduct by their supervisors. See *Avon Convalescent Center, Inc.*, 200 NLRB at 706 (concluding that employer was liable for conduct and statement of five nurses because those nurses were supervisors); *Rockville Nursing Center*, 193 NLRB 959, 962 (1971) (concluding that employer was responsible for acts and conduct of eight RNs because the RNs were supervisors), overruled by *Northcrest Nursing Home*, 313 NLRB 491 (1993).

Likewise, in cases involving sexual harassment, this Court has held that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate or successively higher authority over the employee." *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Industries v. Ellerth*, 524 U.S. 742, 745 (1998).

The substantial evidence on the record as a whole supports the Sixth Circuit's conclusion that the six RNs at Caney Creek are supervisors. The RNs responsibly direct

an entire staff and are accountable for building operations for more than 75% of the week. Their authority responsibly to direct employees flows from management and requires the use of independent judgment.

CONCLUSION

The Court should affirm the Sixth Circuit's decision that the RNs at Caney Creek are statutory supervisors and, therefore, properly excluded from the bargaining unit.

Respectfully submitted,

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